

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 11, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2017AP724-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2015CT64

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SARAH A. SCHMIDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed.*

¶1 NEUBAUER, C.J.¹ Sarah A. Schmidt appeals from a judgment finding her guilty of operating a motor vehicle with a prohibited alcohol

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

concentration (PAC) and she challenges the denial of her motion to suppress evidence on grounds that probable cause to arrest was lacking. Because we conclude that sufficient evidence existed to reasonably believe that she been driving while under the influence of an intoxicant, there was probable cause for her arrest. We therefore affirm.

BACKGROUND

¶2 On January 28, 2015, at approximately 2:27 a.m., Fond du Lac County Sheriff Deputy Paul Metzger observed a vehicle, later determined to be driven by Schmidt, traveling on State Highway 45. Metzger followed the vehicle for several miles. The vehicle moved back and forth within its lane and varied its speed. After Schmidt's vehicle traveled at thirty-five miles per hour in a thirty-mile per hour zone, Metzger activated his lights and pulled her over.

¶3 Upon contact, Metzger noticed that Schmidt's eyes were red and glassy, and there was an odor of intoxicants. Although Schmidt's voice was shaking and cracking and at times she paused before answering, Metzger believed her speech to be normal. She admitted to consuming three beers between 7:30 p.m. and 11:30 p.m.

¶4 Metzger ordered Schmidt from the vehicle to perform field sobriety testing. Schmidt was shivering due to the cold weather, but Metzger did not notice any problems with her motor coordination or balance. When she requested to speak with a lawyer, Metzger informed her she did not yet have that right. He conducted the horizontal gaze nystagmus test (HGN) and observed six of six clues. Based on that test, Metzger believed that Schmidt was impaired.

¶5 Because of the cold, Metzger asked Schmidt to travel to the sheriff's department to perform the remaining field sobriety tests. Schmidt said that she would perform the tests at the location of the stop and did not want to go to the department. Metzger asked Schmidt for a preliminary breath test. She refused and continued to ask to speak to a lawyer.

¶6 Schmidt was arrested and charged with operating a motor vehicle while under the influence of an intoxicant (OWI), WIS. STAT. § 346.63(1)(a), and with PAC, WIS. STAT. § 346.63(1)(b). Schmidt moved to suppress evidence on grounds that probable cause to arrest was lacking. The court denied the motion. After a trial, the jury found Schmidt not guilty of OWI, but guilty of PAC. Schmidt appeals.

DISCUSSION

¶7 When reviewing a denial of a motion to suppress on probable cause grounds, we will uphold the circuit court's factual findings unless they are clearly erroneous. *State v. Blatterman*, 2015 WI 46, ¶16, 362 Wis. 2d 138, 864 N.W.2d 26. We independently review, however, the application of those facts to constitutional principles, as that is a question of law. *Id.*

¶8 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution protect individuals against unreasonable seizures. It is not an unreasonable seizure when a law enforcement officer reasonably believes that the suspect probably committed or was committing a crime. *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999); *State v. Sykes*, 2005 WI 48, ¶14, 279 Wis. 2d 742, 695 N.W.2d 277 (“A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment.” (citation omitted)). Applied to this case, probable

cause “exists where the totality of the circumstances within the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). A reasonable officer need only believe that guilt is more than a possibility. *County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).

¶9 Schmidt argues that there was insufficient evidence for Metzger to reasonably believe that she was operating her car while impaired and that, therefore, he lacked probable cause to arrest her. She points out the following: her driving behavior itself did not suggest any impairment; weaving within a lane is insufficient to create a reasonable suspicion to stop a vehicle per *State v. Post*, 2007 WI 60, ¶20, 301 Wis. 2d 1, 733 N.W.2d 634; the only traffic law violation, and the only reason Metzger stopped her, was her modest exceeding of the speed limit; she responded properly to the officer’s lights and pulled over; Schmidt’s speech, motor coordination, and balance seemed normal; and Metzger agreed that the odor of intoxicants only shows consumption—which she admitted—as opposed to impairment.

¶10 Schmidt distinguishes this case from *State v. Lange*, 2009 WI 49, 317 Wis. 2d 383, 766 N.W.2d 551, a case cited by the circuit court for the proposition that probable cause can exist even if certain common indicia of alcohol use are absent. In *Lange*, there were no odors, slurred speech, balance problems, admissions of consumption, empty bottles or cans, or known visits to a bar, but the driving was “wildly dangerous,” i.e., crossing the center line, driving on the wrong side of the road, traveling at eighty miles per hour in a thirty-mile

per hour zone, and veering off the road through a utility pole. *Id.*, ¶¶21, 24. The court concluded that the evidence was sufficient to find probable cause. *Id.*, ¶38.

¶11 Schmidt contends that the key factor in *Lange* was a factor absent here—reckless driving. Despite following her for several miles, Metzger had no reason to pull her over until she failed to lower her speed by five miles per hour as she traveled into a lower speed limit zone. Because her driving did not suggest impairment, and because other indicators of alcohol use were insufficient to amount to probable cause, Schmidt asserts that there was no probable cause for an arrest.

¶12 Schmidt’s argument fails because it only looks at particular, isolated factors and ignores significant facts. Probable cause must be determined on the *totality* of the circumstances. It is a “flexible, common-sense measure of the plausibility of particular conclusions about human behavior.” *Lange*, 317 Wis. 2d 383, ¶20 (citation omitted). Also, the threshold is not conclusive proof nor even a preponderance of evidence. *Id.*, ¶38. If guilt is more than a possibility, probable cause exists. *Sharpee*, 154 Wis. 2d at 518.

¶13 The following circumstances would lead a reasonable officer to believe, even when considered together with the factors emphasized by Schmidt, that she was driving while impaired. It was about 2:30 a.m., a time at which, as testified to by Metzger, a higher percentage of drivers than normal are under the influence of an intoxicant. See *State v. Swanson*, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991), *abrogated on other grounds by Sykes*, 279 Wis. 2d 742, ¶27 (accident occurring at 2:00 a.m. is an indicia of driving while under the influence, as this is the time bars in Wisconsin close). Schmidt’s eyes were red and glassy; Schmidt offers no alternative explanation for this condition. Metzger detected a

strong odor of alcohol and Schmidt admitted to having had three beers. *See Lange*, 317 Wis. 2d 383, ¶37 (the odor of alcohol and an admission to consuming it—evidence of intoxicant usage—are typical indicators in drunk driving cases and “strengthen[] the existence of probable cause.”). The HGN test indicated impairment, with Metzger observing six of six clues. Schmidt refused to give a preliminary breath test; such a refusal “strengthens the probable cause for an arrest.” *State v. Rocha-Mayo*, 2014 WI 57, ¶111, 355 Wis. 2d 85, 848 N.W.2d 832. Although not sufficient by itself to support a stop, Schmidt’s driving behavior—weaving within her lane—adds further support to a reasonable belief of impaired driving, as does the varying speed, and the undisputed grounds for the stop, exceeding the speed limit.²

¶14 Schmidt’s interpretation of *Lange* nearly elevates negligent or reckless driving from a relevant factor to a requirement for a probable cause determination. Schmidt’s interpretation is in error. While the reckless driving in *Lange* was an important factor, probable cause was supported by additional circumstances, e.g., the time of night, discovery of Lange’s prior conviction for OWI, the officers’ experience, and the nature of the collision having blocked opportunities for further investigation. *Lange*, 317 Wis. 2d 383, ¶¶24-34. Contrary to Schmidt’s view, *Lange* stands for the proposition that “[t]he totality of the circumstances is the test.” *Id.*, ¶37. We agree with the circuit court that the circumstances, viewed as a whole, support probable cause for Schmidt’s arrest.

² In making its determination, the circuit court did not consider Schmidt’s shaky voice or other indications of high emotion. The court also did not consider Schmidt’s refusal to go to the sheriff’s department to perform the field sobriety tests, as she agreed to do them at the place of the stop. Because we conclude that the factors discussed above support a probable cause finding, we need not consider these circumstances either.

CONCLUSION

¶15 Based on all of the circumstances, including some indicia of impaired driving that were absent, we conclude that there was sufficient evidence for Metzger to reasonably believe that Schmidt was driving her vehicle while impaired. He therefore had probable cause for her arrest and the circuit court properly denied the motion to suppress.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

